



Federal Communications Commission  
Washington, D.C. 20554

May 23, 2007

VIA USPS and E-MAIL

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Re: Freedom of Information Act Request (FOIA Control No. 2007-258) for records submitted under a Request for Confidential Treatment in WT Docket Nos. 07-16, 07-30

Dear Counselors:

By this letter, we grant in part and deny in part the Freedom of Information Act request (FOIA Request) filed by NetfreeUS, LLC (NetfreeUS), on April 10, 2007.<sup>1</sup> We also grant in part and deny in part the Request for Confidential Treatment (Confidentiality Request) of a letter (Letter) that M2Z Networks, Inc. (M2Z) filed in the above-referenced, docketed proceedings on March 26, 2007.<sup>2</sup>

*Confidentiality Request.* M2Z states that the Letter contains information relating to M2Z's financial qualifications that is relevant to the FCC's review of M2Z's application for an exclusive, nationwide license for the 2155-2175 MHz band (Application).<sup>3</sup> In this connection, M2Z avers that the Letter contains "commercial or financial information" that is "privileged and confidential"<sup>4</sup> and that public disclosure would adversely affect M2Z by alerting competitors of a potential funding source and M2Z's negotiating terms, which would also adversely impact M2Z's ability to negotiate with potential sources of additional funds.<sup>5</sup> Alternatively, M2Z requests confidential treatment pursuant to Section 0.459(b) of the Commission's Rules.<sup>6</sup>

<sup>1</sup> NetfreeUS filed the FOIA Request on April 10, 2007, and it was received by the FOIA Control Staff on April 11, 2007. See FOIA Control No. 2007-258.

<sup>2</sup> See Letter to Marlene Dortch, Secretary, FCC, from W. Kenneth Ferree, Esq. (March 26, 2007).

<sup>3</sup> See Confidentiality Request at 1-2.

<sup>4</sup> *Id.* at 2 citing 47 C.F.R. §§ 0.457(d) & 0.457(d)(1)(i) (citing 5 U.S.C. § 552(b)(4) and 18 U.S.C. § 1905).

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* citing 47 C.F.R. § 0.459(b).

*FOIA Request.* NetfreeUS seeks to inspect the Letter pursuant to the Freedom of Information Act.<sup>7</sup> NetfreeUS contends that the Commission will benefit substantially by enabling it and the other interested parties to review and comment on the financial-qualification information in the Letter that M2Z purports to offer in support of its application. Moreover, according to NetfreeUS, fundamental fairness requires that interest parties be afforded the opportunity to review and comment on the Letter because M2Z should not be allowed to criticize other competing applicants' financial showings in the above-referenced, docketed proceedings, when it refuses to make public its own financial information.<sup>8</sup>

*M2Z Response.* On May 3, 2007, we mailed the FOIA Request to M2Z in accordance with 47 C.F.R. § 0.461(d)(3), and M2Z responded on May 8, 2007, by referencing the Confidentiality Request and stating that the FOIA Request should be denied.<sup>9</sup>

### Discussion

Section 0.457 of the Commission's Rules specifically describes materials that the Commission does not routinely make available for public inspection.<sup>10</sup> For materials not specifically listed in Section 0.457, Section 0.459 provides a mechanism by which any party submitting information to the Commission may request that the information be kept confidential.<sup>11</sup> A party seeking confidential treatment under this rule is required to submit a statement of the reasons for withholding the materials from inspection and of the facts upon which those reasons are based.<sup>12</sup> Mere conclusory or generalized allegations cannot support a request for nondisclosure.<sup>13</sup> Rather, Section 0.459(d) of the Commission's Rules<sup>14</sup> provides that a request for confidentiality will be granted if it presents by a preponderance of the evidence a case for nondisclosure consistent with the provisions of the Freedom of Information Act (FOIA).<sup>15</sup> To "reduce the number of unsubstantiated requests that we receive and conserve the resources of submitters by providing them with guidance as to what kind of information we require to decide a

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<sup>7</sup> See 47 C.F.R. § 0.461, 5 U.S.C. § 552. The FOIA Request also sought to inspect the Confidentiality Request itself, but M2Z subsequently filed the Confidentiality Request on ECFS, thereby making it public.

<sup>8</sup> FOIA Request at 2 citing Consolidated Motion of M2Z Networks, Inc. to Dismiss Alternative Proposals, WT Docket Nos. 07-16, 07-30 (filed Mar. 26, 2007) at 45-48.

<sup>9</sup> See Letter to Marlene Dortch, Secretary, FCC, from Erin L. Dozier, Esq. (May 8, 2007), at 1-2.

<sup>10</sup> 47 C.F.R. § 0.457.

<sup>11</sup> 47 C.F.R. § 0.459.

<sup>12</sup> 47 C.F.R. § 0.459(b).

<sup>13</sup> See National Exchange Carrier Ass'n, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 7184, 7184 ¶ 3 (1990) (quoting *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976)).

<sup>14</sup> 47 C.F.R. § 0.459(d).

<sup>15</sup> 5 U.S.C. § 552. See also 47 C.F.R. § 0.459(d)(2). Once the Commission finds that an adequate showing is made under Section 0.459, the materials are afforded confidential treatment as described in Section 0.457. Section 0.459(h) states that once a confidentiality request is granted, the status of the materials is the same as that of materials listed in Section 0.457. See 47 C.F.R. § 0.459(h).

confidentiality request," Section 0.459(b) sets forth nine categories of information that a submitter may provide to substantiate requests for confidentiality.<sup>16</sup>

*Section 0.457 Analysis.* Under M2Z's first theory, the Letter must be treated as confidential because it falls within the definition of materials routinely withheld from public inspection under Section 0.457(d)(1)(i) of the Commission's Rules.<sup>17</sup> We disagree. Section 0.457(d) specifically lists those materials that the Commission accepts on a confidential basis and which are not routinely available for public inspection, and paragraph (d)(1)(i) lists "[f]inancial reports submitted by licensees of broadcast stations pursuant to former § 1.611 or by radio or television networks . . .". M2Z does not claim to be a broadcast station nor a radio or television network. Accordingly, we conclude that the Letter does not fall within the scope of Section 0.457(d)(1)(i). Moreover, Section 0.457(d)(2) states that "[u]nless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, it is important for any person who submits materials which he wishes withheld from public inspection under 5 U.S.C. 522(b)(4) to submit therewith a request for non-disclosure pursuant to §0.459."<sup>18</sup>

*Section 0.459 Analysis.* Even where materials are not automatically afforded confidential treatment, we will consider specific requests to withhold materials from routine public inspection. We now turn to M2Z's claim that its Letter should be withheld from routine public inspection under what is commonly referred to as "Exemption 4" to the FOIA.<sup>19</sup> That provision allows for the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>20</sup> The prong of Exemption 4 that is applicable here pertains to documents that contain confidential commercial materials obtained from a person. In this context, "commercial" is to be given its ordinary meaning<sup>21</sup> and we conclude that M2Z's Letter satisfies this test because parts of it contain commercial or financial data that M2Z has not made public.<sup>22</sup>

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<sup>16</sup> See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816, 24825 ¶ 11 (1998) (*Confidentiality Policy R&O*). These nine provisions are contained in § 0.459(b)(1)-(9) of the Commission's Rules, 47 C.F.R. § 0.459(b)(1)-(9).

<sup>17</sup> See Confidentiality Request at 2 n.4.

<sup>18</sup> 47 C.F.R. § 0.457(d)(2). See *In the Matter of TKR Cable Company of Ramapo*, *Memorandum Opinion and Order*, 11 FCC Rcd 3538 (1996) (Commission rejected the petitioner's argument that because the material in question – namely, FCC Form 393 – was similar to information routinely withheld by the Commission but was not specifically listed in Section 0.457, the submission should automatically be afforded confidential treatment).

<sup>19</sup> See 5 U.S.C. § 552(b)(4).

<sup>20</sup> *Id.*

<sup>21</sup> *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983) (*Public Citizen*).

<sup>22</sup> In *Public Citizen*, the Court rejected the argument that "Exemption 4 should be confined to records that actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business," and instead found that records which were produced during ongoing clinical studies of the safety and efficacy of optical devices were "commercial" because documentation of the health and safety experience of the devices would be instrumental in gaining marketing approval for the products. 704 F.2d. at 1290. Under such a broad interpretation of "commercial," we believe that information contained in M2Z's Letter satisfies this prong of the Exemption.

Where a party is required to submit information to a Federal Government agency, the standard for determining if such commercial or financial information is "confidential" under Exemption 4 of FOIA is if disclosure of such information is likely to: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.<sup>23</sup>

Based on the preponderance of the evidence before us, we conclude that parts of the Letter are confidential, financial information of a kind that would customarily not be released to the public by the person from whom it was obtained. M2Z states that information in the Letter "is extremely sensitive, as it sets forth the identity of a potential source of funds as well as certain terms and conditions under which funds would likely be made available."<sup>24</sup> M2Z explains that disclosing this information would significantly prejudice M2Z in any separate negotiations with other funding sources, and would alert other communications providers of a potential source of funds and some of the terms and conditions under negotiation, thereby prejudicing M2Z's ability to compete.<sup>25</sup> In addition, M2Z states that it has taken steps to ensure that this information is not disclosed to the public and that the material for which non-disclosure is sought is not available to the public.<sup>26</sup> We also agree with M2Z that previous Commission interpretations of Exemption 4 – for example, the *ELLIPSO* decision – support a finding that portions of the Letter constitute the type of business information that may be properly withheld under FOIA.<sup>27</sup> Because we find that M2Z has demonstrated sufficiently that non-disclosure of parts of the Letter is consistent with the provisions of the FOIA, we conclude that there is a statutory basis for withholding parts of the Letter by affording confidential treatment under Section 0.459.<sup>28</sup> Therefore, although the entire letter is not subject to confidential treatment, in accordance with Section 0.461(f)(5) of the rules, we will redact those parts of the Letter that identify the source of the potential funding including indirect, identifying information, as well as specific funding terms; the remainder of the Letter will be made available for public inspection.<sup>29</sup> We note that NetfreeUS argues in its FOIA Request that the Commission should permit interested parties to review the Letter to comment on the "reasonable

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<sup>23</sup> *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C.Cir.1992) (*en banc*), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*); Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, GEN Docket No. 96-55, *Report and Order*, 13 FCC Rcd 24816, 24819 (1998) (*Confidential Information Policy Order*).

<sup>24</sup> See Confidentiality Request at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> See Application of Mobile Communications Holdings, Inc. for Authority to Construct the, ELLIPSO

Elliptical Orbit Mobile Satellite System, 10 FCC Rcd. 1547, 1548 (IB 1994) ("buyers receive a clear competitive advantage if they know the prices that other buyers have been charged as a result of individual negotiations").

<sup>28</sup> See, e.g., In the Matter of Paul D. Colford, The Daily News, On Request for Inspection of Records, FOIA Control No. 21-132, *Memorandum Opinion and Order*, 17 FCC Rcd 2073 (2002) (the documents sought "could conceivably assist a competitor in ascertaining [the proposed assignee's newspaper's] financial position and . . . [t]he fact that [the assignment applicants may have placed The New York Post's financial condition in issue . . . is not dispositive of whether disclosure of the financial information is appropriate.").

<sup>29</sup> 47 C.F.R. § 0.461(f)(5).

assurances” that M2Z purports to offer in support of its Application.<sup>30</sup> Although the Commission has concluded that most information submitted in Title III license application proceedings should be made publicly available,<sup>31</sup> the Commission has also found that applicants should not necessarily be required to forgo confidential information as a condition of obtaining a license.<sup>32</sup> In the instant case, we conclude that limited disclosure under a “Protective Order” to allow a party to review confidential materials pursuant to certain restrictions would be more appropriate than the unfettered public disclosure sought in a FOIA request. However, “the standard applied in allowing restricted disclosure pursuant to a Protective Order is not relevant in the context of a FOIA request.”<sup>33</sup>

We note that M2Z requested that the Commission return the Letter if the Confidentiality Request is denied.<sup>34</sup> Given that we are denying the Confidentiality Request in part, we note that Section 0.459(e) provides that “no materials submitted with a request for confidentiality will be returned if a request for inspection is filed under § 0.461.”<sup>35</sup>

Because NetfreeUS is a commercial FOIA requestor, it is responsible for payment of the fee.<sup>36</sup> Based upon the Commission’s fee schedule, NetfreeUS is responsible to reimburse the Government for the cost of processing this FOIA request, which is \$17.52. The fee consists of \$17.52 for 15 minutes of a GS 15 (\$70.07/hour) search and review time.<sup>37</sup> NetfreeUS will be billed by, and fees shall be paid to:

Financial Management Division  
Office of Managing Director  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

### Ordering Clauses

IT IS ORDERED that the Request for Confidentiality submitted by M2Z Networks, Inc., on March 26, 2007, is GRANTED, in part, and DENIED, in part to the extent provided herein. Accordingly, we will submit a redacted copy of the Letter for inclusion in the public file (WT Docket Nos. 07-16 and

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<sup>30</sup> See FOIA Request at 2.

<sup>31</sup> *Confidential Information Policy Order*, 13 FCC Rcd at 24838-39 ¶ 34.

<sup>32</sup> See *id.* (where appropriate, the Commission will issue protective orders).

<sup>33</sup> In the Matter of Freedom of Information Act Request for Satellite Construction Contract filed by Pegasus Development Corporation, Pegasus Development Corporation and Pegasus Development Corporation 107 Request for Confidential Treatment, FOIA Control No. 2005-512, *Order*, 20 FCC Rcd 14670, 14673 ¶ 6 (IB 2005).

<sup>34</sup> See Confidentiality Request at 5 citing 47 C.F.R. § 0.459(e) (if the materials are submitted voluntarily, *i.e.*, absent any direction by the Commission, the submitter may request return of the material without consideration if the request for confidentiality should be denied).

<sup>35</sup> 47 C.F.R. § 0.459(e).

<sup>36</sup> See 47 C.F.R. § 0.470(a)(1).

<sup>37</sup> See 47 C.F.R. § 0.467(a)(1).

*07-30). Submission of the redacted version of the Letter to the Commission's public file (ECFS) as indicated herein will not be carried out until the time period within which to file an application for review has expired or M2Z's application for review has been fully and finally resolved by the Commission (or any appropriate court of competent jurisdiction), whichever occurs later. Under Section 0.461(i) of the Commission's Rules, 47 C.F.R. § 0.461(i), M2Z may file an application for review of the Bureau's partial denial of M2Z's Confidentiality Request. Such an application for review must be filed with the Office of General Counsel within 10 days from the date of the instant Letter. We are enclosing a copy of our redacted version of the Letter with our letter today to M2Z.*

IT FURTHER ORDERED that NetfreeUS, LLC's Freedom of Information Act request, FILE NO. 2007-258, is GRANTED, in part, and DENIED, in part, to the extent provided herein. Under Section 0.461(i), NetfreeUS may file an application for review of the Bureau's handling of the FOIA Request. Such an application for review must be filed with the Office of General Counsel within 10 days from the date of the instant Letter. If M2Z does not seek review of the denial in part of its Confidentiality Request, the redacted Letter will be released to NetfreeUS. The undersigned official is responsible for this response.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION



Joel D. Taubenblatt  
Chief, Broadband Division  
Wireless Telecommunications Bureau

Enclosure to M2Z: redacted Letter

Copy to: Office of General Counsel, FCC

[REDACTED]

March 19, 2007

**PRIVATE AND CONFIDENTIAL**

M2Z Networks, Inc.  
2800 Sandhill Road  
Suite 150  
Menlo Park, CA 94025-7055

Attention: Mr. Milo Medin, Chairman of the Board

Re: Financing for build-out and operations of M2Z Networks, Inc (the "Build-Out")

Dear Sir:

You have advised us that M2Z Networks, Inc. ("Company", "M2Z"), is proposing to build-out a nationwide wireless network to offer high-speed data services as outlined in the business plan and associated materials submitted to us between [REDACTED] [REDACTED]. In this regard, you have asked [REDACTED] [REDACTED] to assess the availability of debt and equity financing.

Our view of M2Z's ability to obtain debt and equity financing for the Build-Out is based on the following: (i) our understanding of the business plan to-date, review of M2Z's technology, its management team, its initial backers and review of documentation and financial model provided by M2Z to [REDACTED] (ii) the availability of a minimum of 20 MHz of spectrum below 4 GHz from the Federal Communications Commission under the terms specified in M2Z's license application; (iii) current market conditions; and (iv) the leadership of [REDACTED] over many years in successfully raising equity and senior bank debt for media and communications companies. In the last five years [REDACTED] has raised over [REDACTED] in equity and debt for media and communications companies in [REDACTED]. [REDACTED] has a strong track record in working with entrepreneurial teams to help build leading media and communications companies including wireless companies such as [REDACTED]. Based on the foregoing, [REDACTED] is confident that it can raise [REDACTED] of debt and equity funding, subject to definitive terms and completion of due diligence, for the Build-Out. The debt funding will be [REDACTED]. In addition, [REDACTED] would [REDACTED] to fund the Build-Out. [REDACTED] will raise the equity from [REDACTED].

[REDACTED] expression of confidence assumes, amongst other things, as determined in [REDACTED] sole discretion: (i) satisfactory completion of all conditions precedent; (ii) satisfactory completion of our due diligence; (iii) additional equity contribution on terms and conditions satisfactory to [REDACTED] and M2Z, for a debt underwriting; (iv) the accuracy and completeness of all information, whether verbal or written, including all documentation provided by M2Z to [REDACTED] (v) all necessary credit approvals; (vi) stable financial markets at the time of the financing; and (vii) the absence of any material adverse change in the conditions, results from operations or business prospects.

[REDACTED]

This letter is not intended to be, and shall not constitute a commitment or undertaking by [REDACTED] to underwrite, lend or arrange equity and/or debt financing. In addition, this letter is not to be distributed or disclosed to, or otherwise relied upon by, any other person without [REDACTED] prior consent; provided, however, you may disclose this letter to the FCC subject to appropriate confidentiality provisions in connection with your proposed application for spectrum to provide the services outlined in M2Z's business plan.

Very truly yours,

[REDACTED]  
Per: [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Per: [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]